

VI. CONSULTATIVE REPORT ON GROUP 4 CHECKLIST ITEMS

This portion of the report considers issues concerning checklist item 2 (access to unbundled network elements ("UNEs")), checklist item 4 (access to unbundled loops), checklist item 5 (access to unbundled local transport) and checklist item 6 (access to unbundled local switching). The report also considers issues regarding enhanced extended loops and line splitting. The record on these checklist items was developed through workshops, written filings including testimony, comments, and briefs. A formal hearing was also held before the NDPSC.

Qwest filed testimony of Karen Stewart, Lori Simpson and Jean Liston on January 19, 2001. On or about February 23, 2001, the following participants filed testimony or comments: AT&T, XO Utah, Inc., Electric Lightwave, Inc. and The Association of Communications Enterprises ("ASCENT"). The New Mexico Public Regulation Commission Advocacy Staff filed testimony on December 20, 2000. AT&T filed verified comments on loops, line splitting, and NIDS on March 26, 2001. Qwest filed rebuttal testimony of Lori Simpson and Karen Stewart on March 9, 2001. On March 23, 2001, Rhythms filed the affidavit of Valerie Kendrick regarding loops and XO filed additional response testimony of David LaFrance. Qwest filed rebuttal testimony of Jean Liston on April 18, 2001. Briefs were filed on or about May 31, 2001 by the following parties: Qwest, AT&T, ELI/XO, Rhythms, and the Wyoming Consumer Advocate Staff. Qwest and AT&T filed supplemental briefs on June 18, 2001. Workshops were held on March 26-30, 2001 and April 30-May 4, 2001 in Denver, Colorado. The facilitator filed his report on this workshop on August 20, 2001.

On August 30, 2001, Qwest and AT&T filed comments on the report.

On September 5, 2001, the NDPSC issued a Notice of Hearing. A formal hearing on the facilitator's report was held as scheduled on September 20, 2001, in the Commission hearing room, State Capitol, 12th Floor, Bismarck, North Dakota. Qwest appeared at the hearing and presented testimony and evidence in support of its position. No intervenors appeared. On October 5, 2001, Qwest filed a post-hearing memorandum on Group 4 issues.

On January 16, 2002, the NDPSC issued its Interim Consultative Report on the Group 4 Checklist items.

The following is the NDPSC's Consultative Report on the Group 4 Checklist items.

A. Checklist Item 2 – Access to Unbundled Network Elements

1. Background

Section 271(c)(2)(B)(ii) requires “[n]ondiscriminatory access to network elements in accordance with the requirements of Sections 251(c)(3) and 251(d)(1).” Section 251(c)(3) requires Qwest and other incumbent local exchange companies to provide access to unbundled network elements (“UNEs”) “on rates, terms and conditions that are just, reasonable and nondiscriminatory” The checklist item 2 portion of this Consultative Report addresses general UNE issues, UNE platform or “UNE-P” issues, and issues for other combinations.

2. Overview

The parties raised a total of 22 issues related to UNEs generally. Three of these issues were presented to the NDPSC with the facilitator’s proposed resolution in the Group 2 Report, and are addressed in the NDPSC’s consultative report on Group 2 issues. Fifteen of those issues were resolved during the Workshop. Three of those issues were presented to the NDPSC with the facilitator’s proposed resolution in the Group 4 Report. One issue was deferred to another workshop, and a portion of another issue was deferred until completion of the ROC OSS testing.

The three issues addressed in the Group 2 consultative report were:

- Including LIS in the Definition of Finished Services
- Marketing During Misdirected Calls
- Regeneration Charges

The issues resolved between the parties regarding UNEs generally are discussed in the Group 4 Report beginning on page 16. The resolved issues include:

- Definitions
- Changes in Law Regarding Access to UNEs
- General Obligation to Provide UNE Access
- UNE Use Restrictions
- UNE Demarcation Points
- UNE Testing
- UNE Provisioning Intervals
- Notice of Changes Affecting UNE Transmission Parameters
- UNE Rates
- Miscellaneous Charges
- Construction Charges for Ancillary and Finished Services
- Unbundled Customer Controlled Rearrangement Element (UCCRE)
- UNE Demarcation Points
- Access to Newly Available UNEs and UNE Combinations

- Information Access When Customers Change Service Providers

The unresolved issues regarding UNEs generally are discussed in the Group 4 Report beginning on page 21. The issues include:

- Construction of New UNEs
- Commingling UNEs and Tariffed Services on the Same Facilities
- OSS Testing

The issue deferred to another workshop was:

- Bona Fide Request Process. This issue is discussed in the *Consultative Report on Group 5 Issues, General Terms and Conditions, Bona Fide Request Process* section of this report.

The issue deferred to completion of OSS testing was:

- OSS Testing (stand-alone test environment). This issue is discussed below in the *OSS Testing* section

3. Analysis of Evidence

a. Construction of New UNEs

AT&T argued that Qwest should be obliged to build new facilities to provide UNEs for CLECs under the same terms and conditions that it would construct them for its own end users. AT&T further argued that Qwest should perform such construction at cost based prices, which presumably means TELRIC costs, not the actual costs of construction of the particular UNE. AT&T argued that CLECs would be denied a meaningful opportunity to compete in the event that Qwest is not required to build facilities to provide CLECs network elements (other than transport) under the same terms and conditions that it would construct for itself or its end users. AT&T also objected to Qwest's refusal to accept an obligation either to: (a) place electronics on dark fiber in order to make it available as dedicated transport, or (b) replace electronics to expand existing capacity of the fiber.

Qwest responded that its obligation to build UNEs should be limited to cases where it has a legal obligation to build for its own end users, citing paragraph 451 of the First Report and Order, which limits the unbundling of facilities to "existing incumbent LEC facilities."¹⁰⁹ Despite this argument, Qwest did agree to undertake specific construction obligations in the SGAT at Sections 9.1.2.1 and 9.1.2.2. The facilities encompassed by this commitment include conditioning, placing a loop, adding a network interface device, adding a card to central office or remote equipment, and adding central office tie pairs and field cross jumpers. AT&T argued that this offer is insufficient because it extends only to DSO loops, not higher capacity loops.

¹⁰⁹ *Local Competition Order* at ¶24. (Complete cite in Cumulative Consultative Report)

The facilitator determined there is no clear basis for concluding that the failure to require Qwest to undertake an obligation to construct new facilities will significantly hinder fulfillment of the Act's general objectives, let alone its specific requirements. Accordingly, Qwest should not generally be required to construct new facilities to provide CLECs with UNEs. Likewise, the facilitator determined Qwest has no obligation to place or modify electronics on dark fiber in order to make it available as dedicated transport.

NDPSC agrees with the facilitator's determinations and has no objection to Qwest's proposed SGAT Sections 9.1.2.1 and 9.1.2.2.

b. Commingling UNEs and Tariffed Services on the Same Facilities

Qwest's SGAT Section 9.23.1.2.2 broadly prohibits the use of the same facilities to provide both tariff services (such as special access services) and UNEs arguing that such combined or commingled use could allow CLECs to inappropriately avoid access charges. XO/ELI argued for the elimination of the Qwest SGAT provisions prohibiting such commingling. It should be noted that XO/ELI are not intervenors in North Dakota.

The FCC has temporarily prohibited the use of the same facilities to provide both tariff services (such as special access services) and UNEs, while it addresses its concerns about whether such combined or commingled use could allow CLECs to inappropriately avoid access charges. AT&T argued that the SGAT language would prohibit CLEC use of UNEs in cases broader than those temporarily banned by the FCC.

The facilitator concluded that Qwest should not be permitted to impose restrictions broader than those specifically addressed by the FCC. Therefore, the facilitator recommended the following be added to Qwest SGAT Section 9.23.1.2.2:

Where specifically prohibited by applicable federal or state requirements, UNE Combinations will not be directly connected to a Qwest Finished Service, whether found in a tariff or otherwise, without going through a collocation, unless otherwise agreed to by the Parties.

The NDPSC agrees with the facilitator's recommendation and finds that Qwest has included the recommended language in its compliance SGAT filing.

c. OSS Testing

AT&T raised concerns about the lack of SGAT language regarding testing of the Qwest's OSS capability to support large-scale market entry by CLECs. The major aspects of AT&T's concerns were 1) the need for SGAT language generally providing options for testing of OSS and interfaces, 2) the need for SGAT language providing a

"stand-alone test environment" to test new OSS interfaces, and 3) the need for SGAT language providing comprehensive production testing.

Regarding general SGAT language for OSS testing, AT&T argued that it is absolutely essential for any contractual relationship between Qwest and a CLEC that the parties know the scope of Qwest's obligation to provide testing.

AT&T argues that the FCC has made it clear that, prior to issuing a new OSS software release or upgrade, the ILEC must provide a testing environment that mirrors the production environment in order for CLECs to test the new release. AT&T states that adding language to the SGAT is a paper promise and is insufficient. AT&T states that Commissions should reject any finding of compliance with checklist item 2 absent evidence that the availability of a stand-alone test environment has been tested by the third-party as part of the Regional Oversight Committee (ROC) OSS test.

In addition to connectivity testing, a stand-alone test environment, interoperability testing, and controlled production testing, AT&T argues that Qwest's SGAT must provide for testing in a comprehensive manner. AT&T states that Qwest's SGAT must include specific testing, and must also permit CLECs to comprehensively test whether the Qwest systems and interfaces, and CLEC systems and interfaces built to Qwest's specifications, work as contemplated in a commercial setting in commercial volumes.

Qwest responded with new SGAT language at 12.2.9.3 to provide connectivity testing, stand-alone testing environment, interoperability testing, and a controlled production process to validate the ability of the CLEC to submit actual production requests and determine operational readiness. Qwest objected to AT&T's detailed proposal for comprehensive production testing.

The facilitator recommended that the issue regarding the availability of a stand-alone test environment should be deferred until state commission consideration of the results of the current ROC third-party OSS test.

The facilitator determined that AT&T's proposed language for SGAT Section 12.2.9.3.5 would adopt a prescriptive approach to comprehensive testing that would not allow for negotiation between Qwest and CLECs with respect to test scope, conditions, or payment responsibility. Nonetheless, the facilitator determined there could be circumstances where a CLEC has a particular need for testing beyond what is already contemplated by the SGAT. Therefore, the facilitator recommended the following language should be included in the SGAT in lieu of AT&T's proposed Section 12.2.9.3.5:

Upon request by a CLEC, Qwest shall enter into negotiations for comprehensive production test procedures. In the event that agreement is not reached, the CLEC shall be entitled to employ, at its choice, the dispute resolution procedures of this agreement or expedited resolution through request to the state commission to resolve any differences. In

such cases, CLEC shall be entitled to testing that is reasonably necessary to accommodate identified business plans or operations needs, accounting for any other testing relevant to those plans or needs. As part of the resolution of such dispute, there shall be considered the issue of assigning responsibility for the costs of such testing. Absent a finding that the test scope and activities address issues of common interest to the CLEC community, the costs shall be assigned to the CLEC requesting the test procedures.

Qwest has added the recommended language to the SGAT at Section 12.2.9.8. Qwest deviated from the facilitator's language only slightly by inserting the phrase "in addition to the testing set forth in Section 12.2.9" for purposes of clarity.

The facilitator also recommended rejection of other changes in Section 12.2.9.3 that AT&T had requested and Qwest had specifically opposed. He recommended, however, that Qwest should incorporate other changes to the section that Qwest had not opposed. Qwest testified that following the UNE workshops, Qwest, AT&T, and other interested CLECs in the multi-state proceedings negotiated and reached agreement on the text for Sections 12.2.9.3. In its compliance filing to the NDPSC, Qwest incorporated what it referred to as consensus language rather than the proposed AT&T language recommended by the facilitator. AT&T has not presented testimony concerning this consensus language and the NDPSC has not verified the accuracy of Qwest's new SGAT language.

The NDPSC agrees with the facilitator's recommendation to defer the availability of the stand-alone test environment to the ROC OSS test. Also, assuming the accuracy of the consensus language incorporated into Qwest's SGAT on this issue, the NDPSC accepts Qwest's proposed SGAT language clarification to the facilitator's proposed language for comprehensive production test procedures and accepts Qwest's proposed language for Section 12.2.9.3 in lieu of or in addition to the language recommended by the facilitator.

The evaluation of Qwest's pre-order/order interface, the Stand Alone Test Environment ("SATE"), was conducted as part of OSS Test 24.6 (Operational Support Systems (OSS) Interface Development Review). *Table 24.6-2.1: Evaluation Criteria and Results* sets forth the results of the evaluation for pre-order/order interfaces. The NDPSC will discuss the findings of the OSS Final Report in the *ROC OSS Test* section of this report.

4. Conclusion

Qwest should be deemed to be in compliance with the requirements for providing CLEC access to unbundled network elements upon verification of consensus language and successful ROC OSS test confirmation of stand-alone test availability.

B. Checklist Item 4 – Access to Unbundled Loops

1. Background

Section 271(c)(2)(B)(iv) requires Qwest and other incumbent local exchange companies to provide: “[l]ocal loop transmission from the central office to the customer’s premises, unbundled from local switching or other services.” The FCC further defined the loop as “a transmission facility between a distribution frame, or its equivalent, in an incumbent LEC central office, and the network interface device at the customer premises.”¹¹⁰ The *UNE Remand Order* modified this definition to include “all features, functions and capabilities of the transmission facilities, including dark fiber and attached electronics (except those used for the provision of advanced services, such as DSLAMS) owned by the incumbent LEC, between an incumbent LEC’s central office and the loop demarcation point at the customer premises.”¹¹¹

Also treated under this topic are two subsidiary issues. The first of these issues is “Line Splitting” which refers to the situation where two different CLECs provide both the voice and data service over a single loop, which Qwest provides. The second issue involves the NID, which is defined as “any means of interconnection of end-user premises wiring to the incumbent LEC’s distribution plant, such as a cross-connect device used for that purpose.”¹¹² Qwest is required to unbundle subloop elements and NIDs.

2. Overview

The parties raised a total of 63 issues related to access to unbundled loops. The facilitator stated that two issues were presented to the NDPSC with the facilitator’s proposed resolution in the Group 3 Report and are addressed in the NDPSC’s cumulative report on Group 3 issues. Forty-five of those issues were resolved during the Workshop. Fourteen issues were presented to the NDPSC with the facilitator’s proposed resolution. Two issues were deferred to another workshop, a portion of one issue was deferred to the Group 5 workshop, and a portion of another issued was deferred to the state cost docket.

The two issues regarding access to unbundled loops that are addressed in the Group 3 consultative report were:

- Line-At-A-Time Access to Splitters (addressed in Group 3 consultative report as “Ownership of and Access to Splitters”)
- Discontinuing Megabit Service (addressed in Group 3 consultative report as “Tying Qwest’s Data Service and Voice Service”)

¹¹⁰ *Id.* at ¶380

¹¹¹ *UNE Remand Order* at ¶167. (Complete cite in Cumulative Consultative Report)

¹¹² *Id.* at ¶233

AT&T, in its comments to the facilitator's report disagreed with the facilitator's conclusion that the line splitting issue (Line-At-A-Time Access to Splitters) was fully resolved in the Group 3 Report. AT&T stated that based upon the record evidence presented in subsequent workshops, it is clear that it is technically feasible for CLECs to access Qwest's splitters on at least a shelf-at-a-time basis. AT&T argued that CLECs purchasing loops are entitled to "all capabilities of the loop including the low and high-frequency spectrum portions of the loop. . . ." ¹¹³

AT&T stated that Qwest relies on the SBC Texas 271 Order to support its position. AT&T argues that the SBC Texas 271 Order does not support Qwest's position, because in that order, the FCC merely notes that it had not yet exercised its rulemaking authority to require ILECs to provide access to splitters, and therefore, it would not require SBC to provide access to splitters as part of that proceeding. ¹¹⁴ AT&T stated that the FCC specifically declined to comment on the requirement that an ILEC provide access to an ILEC-owned splitter on the grounds that it was considering this issue in response to AT&T's petition for reconsideration of the *UNE Remand Order*. ¹¹⁵ AT&T argues that the FCC's decision to not impose a requirement of ILECs to provide access to ILEC-owned splitters in its review of the SBC Section 271 Application should not deter any state commission from imposing such a requirement on Qwest. AT&T stated that, based upon new evidence deduced during the Colorado loop workshop, Qwest should be required to modify its SGAT provide access to Qwest's splitters on a shelf-at-a-time basis.

AT&T did not appear at the hearing before the NDPSC, and this issue was not discussed or investigated further by the NDPSC. According to the information provided by AT&T in its comments to the facilitator's report, the FCC has not issued a ruling on the issue. The NDPSC brings this issue to the attention of the FCC for its consideration in reviewing Qwest's Section 271 Application for North Dakota.

The issues resolved between the parties regarding access to unbundled loops are discussed in the Group 4 Report. The discussion concerning "Loops" begins on page 37 of the Group 4 Report. The discussion relating to "Line Splitting" begins on page 66 and the discussion on "NIDs" begins on page 70. The resolved issues include:

- Definition of Loop Demarcation Point-Loops
- Digital versus Digital-Capable Loops
- Parity in Providing Unbundled Loops
- Limiting Available Analog Loop Frequency
- Method for Providing Unbundled IDLC Loops
- Choosing Loop Technology Types
- CLEC Authorization for Conditioning Charges-Loops
- Access to Loop Features, Functions, and Capabilities

¹¹³ 47 C.F.R § 51.319(a)(1).

¹¹⁴ *SBC Texas 271 Order*, ¶ 328.

¹¹⁵ *Id.*

- Offering High Capacity and Fiber Loops on an Individual Case Basis
- Charges for Unloading Loops
- Extension Technology to Give Loops ISDN Functionality
- DS1 and DS3 Loop Specifications
- Access to Digital Loops Where Available
- Loop Installation Process
- Coordinated Installation-Loops
- Limits on Loop Testing Costs
- Obtaining Multiplexing for Unbundled Loops
- Transmission Parameters-Loops
- CLEC/End User Disagreements about Disconnecting or Connecting Loops
- Qwest Access to Qwest Facilities on CLEC Customer Premises-Loops
- Points of CLEC Access to Unbundled Loops
- Relinquishing Loops on Loss of End Use Customers
- CLEC Right to Select From Available Loop Technologies
- Miscellaneous Charges-Loops
- Installation Hours-Loops
- Unforecasted Out-of-Hours Coordinated Loop Installations
- Overtime for Out-of-House Installations-Loops
- Proofs of Authorization-Loops
- ICB Intervals for Large Loop Orders
- Firm Order Confirmations-Loops
- Conditions Excusing Compliance with Loop Installation Intervals
- Maintenance and Repair Parity-Loops
- Specifying Repair Intervals in the SGAT-Loops
- Responsibility for Repair Costs-Loops
- Presumptions About the "Lead" CLEC-Line Splitting
- Pre-Provisioning of the Splitter in the End User's Central Office-Line Splitting
- Limits on Uses of the High- and Low-Frequency Loop Portions-Line Splitting
- Charges for OSS Modifications-Line Splitting
- Access to All NID Features
- Smart and MTE NIDs
- Availability of NIDs When CLEC Provides Loop Distribution
- Other Kinds of Permissible NID Access
- NID Ownership
- Rates for Other Than Single-Tenant NIDs
- NID Ordering Documents

The unresolved issues regarding access to unbundled loops relating to "Loops" are discussed beginning on page 48 of the facilitator's Group 4 Report. The discussion

of unresolved issues concerning "Line Splitting" begins on page 68 and the discussion on unresolved "NID" issues begins on page 72. The unresolved issues include:

- Standard Loop Provisioning Intervals
- Loop Provisioning and Repair Intervals - Utah
- Reciprocity of Trouble Isolation Charges-Loops
- Delays in the Roll-Out of ADSL and ISDN Capable Loops
- Cooperative Testing Problems-Loops
- Spectrum Compatibility-Loops
- Conditioning Charge Refund-Loops
- Pre-Order Mechanized Loop Testing
- Access to LFACs and Other Loop Information Databases
- Limiting Line Sharing to UNE-P-Line Splitting
- Liability for Actions by an Agent-Line Splitting
- "NID" Definition and Access to Terminals Where Qwest Owns Facilities in the Direction of the End User
- Protector Connections-NID
- CLEC Use of Qwest's NID Protector Without Payment

A summary of the deferred issues begins on page 36 of the facilitator's Group 4 Report. The issues deferred were:

- Accepting Loop Orders with "Minor" Address Discrepancies - Deferred resolution until completion of OSS testing. This issue is discussed below in the *Accepting Loop Orders with "Minor" Address Discrepancies* section.
- Resolving Conflicts Between the SGAT and Parallel Documents - Deferred to General Terms and Conditions Workshop. This issue is discussed in the *Consultative Report on Group 5 Issues, General Terms and Conditions, Conflicts Between the SGAT and Other Documents* section of this report.

The portion of the issue deferred on page 53 of the facilitator's Group 4 Report to the Group 5 workshop was:

- The general process for responding to requests for access to non-standard UNEs. This issue is discussed in the *Consultative Report on Group 5 Issues, General Terms and Conditions, Scope of Special Request Process* section of this report.

The portion of the issue deferred on page 52 of the facilitator's Group 4 Report to the state cost docket was:

- The ability to challenge in subsequent cost proceedings the issue of double recovery of trouble isolation costs.

3. Analysis of Evidence

a. Standard Loop Provisioning Intervals

AT&T challenged a number of the standard loop intervals that had been established as PIDs in ROC process. AT&T argued that the length of the SGAT's standard loop provisioning intervals (the time between orders and in-service dates) would not provide CLECs a meaningful opportunity to compete, were discriminatory or anti-competitive, violated state law in some cases, and would preclude CLECs from being able to meet the service quality standards of some of the participating states.

Qwest maintained that the provisioning intervals were consistent with the intervals used during the ROC's development of the Performance Measures against which the OSS test would be conducted. Qwest cited testimony by ROC's project manager as evidencing the fact that the standards for Performance Measure OP-3 (percent of installations completed on the due date) and for OP-4 (number of days to complete installation) were formed on the basis of Qwest's Standard Interval Guides (SIGs), which are reflected in SGAT Exhibit C. Qwest also testified that it recently added an offering referred to as "Quick Loops" which will allow CLECs to secure access to certain two wire unbundled loops within a shorter interval. The Quick Loops are available when converting existing loops where coordination and testing are not required. The Quick Loops have a three-day installation interval, which shortens the standard loop interval.

AT&T countered by arguing that Qwest's SIG (and by extension SGAT Exhibit C) was not presented to the ROC, nor did the ROC ever formally approve any of the SGAT Exhibit C standard intervals. AT&T argued that it was never foreclosed from arguing in a later 271 context that Qwest's standard intervals were too long. AT&T did state that Qwest's Quick Loops proposal responded to a portion of AT&T's concern.

The facilitator stated that the evidence demonstrated conclusively that the ROC established its loop installation interval related performance measures (OP-3 and OP-4) through an open and collaborative process that benefited from full, open, and substantial participation by the CLEC community. The facilitator determined that the ROC discussion of those intervals centered upon and were integrally related to the intervals of Qwest's SIG which forms the basis of the installation intervals in SGAT Exhibit C.

The facilitator also stated that AT&T is not barred from urging the creation of different intervals, but that the installation intervals established by the ROC were entitled to very substantial weight. AT&T commented that the facilitator's conclusion improperly shifts the burden to the CLEC to refute the appropriateness of the intervals, when the burden should be on Qwest to show why these intervals are appropriate in the first instance.

The facilitator recommended that record in the workshops supports a conclusion that the Qwest intervals contained in SGAT Exhibit C are generally appropriate as they are in line with what the ROC considered in an open and collaborative process. The CLECs did not present substantial evidence to counter the evidence of record showing that the intervals are at parity with Qwest's retail operations and provide CLECs a meaningful opportunity to compete with Qwest for retail business.

The NDPSC agrees with the facilitator's recommendation.

b. Loop Provisioning and Repair Intervals – Utah

One of the CLECs testified that the SGAT's installation and service intervals for loops were not consistent with rules of the Utah Public Service Commission. Because this issue is not applicable to North Dakota, consideration of this issue by the NDPSC is unnecessary.

c. Reciprocity of Trouble Isolation Changes-Loops

SGAT Sections 9.2.5.2 and 9.2.5.3 require CLECs to pay Qwest's costs of isolating the source of network troubles when it is determined that the source of the problem is on the CLEC's side of the demarcation point between the CLEC's and Qwest's facilities. AT&T objected to the lack of a similar ability for the CLEC to charge Qwest for trouble isolation activities when the problem is on Qwest's side of the demarcation point. AT&T also commented that CLECs should not be charged when the source of the trouble is the customer's wiring or equipment.

Qwest frozen SGAT made changes to Section 9.2.5 regarding the trouble isolation charge provisions. AT&T found these changes acceptable, with two exceptions: (a) AT&T wanted to add language allowing CLEC access to the NID for testing purposes; and (b) AT&T wanted to preserve the ability to challenge in subsequent cost proceedings the issue of double recovery of trouble isolation costs.

The facilitator recommended that AT&T's request to preserve the ability to challenge possible double recovery of trouble isolation costs should be deferred to a subsequent state cost proceeding. The facilitator further recommended that it is reasonable to allow CLECs NID access for testing purposes in those cases where access at the demarcation point will not suffice to allow required loop testing. The facilitator recommended the following clause be included in the SGAT:

Qwest shall allow access to the NID for testing purposes where access at the demarcation point is not adequate to allow testing sufficient to isolate trouble; in the event that Qwest chooses not to allow such access, it shall waive any trouble isolation charges that may otherwise be applicable.

The NDPSC agrees with the facilitator's recommendation and finds that Qwest has made the recommended change to its compliance SGAT filing at Section 9.2.5.5. The NDPSC agrees with the facilitator's recommendation that the CLEC ability to challenge the issue of double recovery of trouble isolation charges be deferred to the NDPSC cost docket.

d. Delays in the Roll-Out of ADSL and ISDN Capable Loops

Rhythms testified that Qwest was slow to make ADSL and ISDN capable loops available to CLECs. It should be noted that Rhythms is not an intervenor in the North Dakota proceeding.

Qwest responded that it introduced ISDN service in 1997 and ADSL in the last quarter of 1999. Qwest also responded that there was low demand for these types of loops.

The facilitator noted that Rhythms did not brief this issue. The facilitator stated that Qwest did not dispute the facts about delay, and instead responded by noting the low demand. The facilitator stated further that the existence of low demand may justify the lack of pre-defined offerings, but it should not excuse delay in responding to requests when they are made. The facilitator stated that if Qwest continues to seek to avoid prior identification of terms and conditions for low-demand offerings, that Qwest be prepared to respond quickly in the future to CLEC requests for access to non-standard UNEs. The general process for doing so is scheduled to be addressed in the workshop covering General Terms and Conditions. Nonetheless, the facilitator recommended that Qwest should express its intent to move as expeditiously as possible to respond to non-standard offerings.

Qwest's Comments to the Group 4 Report state that it will move in an expeditious manner to respond to non-standard offerings as outlined in the facilitator's Group 4 Report.

The NDPSC agrees with the facilitator's recommendation and finds that Qwest has expressed its intent, as recommended by the facilitator, to respond quickly in the future to CLEC requests for access to non-standard UNEs. The issue regarding the general process for responding to requests for access to non-standard UNEs is deferred to the Group 5 workshop.

e. Cooperative Testing Problems-Loops

Rhythms testified generally that it had experienced a number of problems with cooperative testing on loop installations. Qwest responded that it had not received any customer-specific data that would allow it to validate the specific concerns of Rhythms; however, Qwest noted it had undertaken a number of activities to improve its performance in coordinated installations.

The facilitator noted that Rhythms did not brief this issue. The facilitator determined that Qwest has taken actions to address problems in supporting coordinated installations and in adopting measures that will avoid the need for them in some cases.

The NDPSC agrees with the facilitator's determination.

f. Spectrum Capability-Loops

Spectrum capability generally means the ability of multiple carriers to send signals through a common cable without causing each other's signals to degrade past an acceptable point.¹¹⁶ Rhythms and AT&T raised three principal areas of concern regarding spectrum capability: (a) interference due to remote DSL deployment which has the potential for disrupting competitor's central-office based services; (b) the removal of existing T1s in the short term (T1s are recognized by the FCC as known causes of disturbance and the FCC allows states to take measures to eliminate them as they feel appropriate)¹¹⁷; and (c) the need to provide NC/NCI codes on service orders which provide information on the locations and types of services offered by the CLEC.

Qwest noted that the FCC has agreed that the issue of remote DSL deployment should be dealt with in industry forums. The FCC has asked the NRIC to submit a report on this issue by January 2002.¹¹⁸

Regarding T1s, Qwest said that it minimizes T1 disturbances by locating such facilities in outer binder groups and by placing the send and receive portions on opposite sides. When this management fails, Qwest has committed in SGAT Section 9.2.6.5 to change a disturbing T1 to a HDSL facility wherever possible.

Qwest said the NC/NCI codes are needed to provide Qwest with the information it needs to resolve spectrum interference issues when a carrier complains.

Regarding remote DSL deployment, the facilitator determined that Rhythms and AT&T had not shown good reason to act in advance of the NRIC report expected by the FCC. On an interim basis, there is no evidence to show that repeaters, or any particular Qwest method of remotely deploying DSL, inherently constitute bad design or operating practice. Therefore, it would be against public policy to adopt blanket requirements that may have the effect of forcing Qwest to adopt more expensive means of designing and operating its network to optimize it for a certain segment of customers, rather than for all customers. Nonetheless, the facilitator recommended that Qwest should be obligated to undertake reasonable actions when given specific information about network locations where its own repeater use or remote DSL deployment could disrupt central

¹¹⁶ *In re Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 98-147, 96-98, 99-355, ¶176 December 9, 1999. (3d Advanced Services Order).

¹¹⁷ *Id.* at ¶218

¹¹⁸ *Line Sharing Order* at ¶186.

office based CLEC DSL services. The facilitator recommended the addition of the following subsection to SGAT Section 9.2.6:

Where a CLEC demonstrates to Qwest that it has deployed central-office based DSL services serving a reasonably defined area, it shall be entitled to require Qwest to take appropriate measures to mitigate the demonstrable adverse effects on such service that arise from Qwest's use of repeaters or remotely deployed DSL service in that area. It shall be presumed that the costs of such mitigation will not be chargeable to any CLEC or to any other customer; however, Qwest shall have the right to rebut this presumption, which it may do by demonstrating to the Commission by a preponderance of the evidence that the incremental costs of mitigation would be sufficient to cause a substantial effect upon other customers (including but not limited to CLECs securing UNEs) if charged to them. Upon such a showing, the Commission may determine how to apportion responsibility for those costs, including, but not limited to CLECs taking services under this SGAT.

The NDPSC finds that Qwest added this language as SGAT Section 9.2.6.9 in its North Dakota SGAT Second Revision dated October 25, 2001.

The facilitator recommended this resolution should be considered interim and subject to reconsideration at such time as the FCC takes any material action in connection with the advice and consent it expects to receive by January 2002 from the NRIC.

AT&T argues that the facilitator's recommendation misses the point which is that rules should be established now that set the ground rules for ensuring that this nascent area of competition be allowed to flourish and is not encumbered by Qwest's actions in deploying remote DSL and repeaters. AT&T states that the dispute is not about who should pay for the cost of removing repeater and remote DSL that inhibit CLEC services, but rather the concern is that Qwest, through its remote DSL deployment, will inhibit and delay the development of advanced services by other providers in remote areas. AT&T states that at a minimum, state commissions should require Qwest to deploy remote DSL technology in a manner that will minimize spectrum compatibility issues in the future.

With respect to removal of T1s, the facilitator recommended that SGAT Section 9.2.6.4 should be changed to incorporate Qwest's policy of placing T1s in binder groups that minimize interference possibilities and replacing T1s that are causing disturbances with another technology, wherever possible. The recommended SGAT change would read:

Qwest recognizes that the analog T1 service traditionally used within its network is a "known disturber" as designated by the FCC. Qwest will place such T1s, by whomever employed, within binder groups in a manner

that minimizes interference. Where such placement is insufficient to eliminate interference that disrupts other services being provided, Qwest shall, whenever it is technically feasible, replace its T1s with a technology that will eliminate undue interference problems. Qwest also agrees that any future "known disturber" defined by the FCC or the Commission will be managed as required by FCC rules.

The NDPSC finds that Qwest made the recommended changes in SGAT Section 9.2.6.4 in its North Dakota SGAT Second Revision dated October 25, 2001.

AT&T stated that the facilitator's language is an improvement over that proposed by Qwest, but recommended that the last sentence in the facilitator's recommendation be modified by adding, at the end of the sentence, the words "and orders and industry standards." AT&T stated that the additional language is necessary because requirements today are found in industry standards and orders adopted by the FCC, and not just in FCC rules. At the hearing before the NDPSC, Qwest stated that it would implement any requirement that was in an "order" as well, but was reluctant to include "industry standards" because Qwest may be in a situation where it would be agreeing to do something before it was finalized as an industry standard.

Regarding NC/NCI codes, Qwest argued that it needs spectral mask information in order to properly manage services in its binder groups and resolve disputes between parties. Contrary to Rhythms' optimism regarding the good behavior of all carriers, the FCC has already anticipated that some carriers may not agree to comply with industry spectrum guidelines. Qwest stated that the FCC determined that incumbent LECs need information regarding the advanced services deployed on their networks, and has required CLECs to disclose to incumbent LECs information on CLEC deployment of DSL technology so that incumbents can maintain accurate records and resolve potential disputes.¹¹⁹

AT&T objects to disclosing such information to Qwest. AT&T argues that spectral mask data is proprietary because it reveals exactly what kind of service a carrier is providing a particular locale and particular end-users, and that it would be unreasonable to require CLECs to disclose their competitive strategy on a daily basis to their competitor. AT&T also argues that spectral mask data is unreliable. Furthermore, AT&T argues that the FCC requirement cited by Qwest was an interim policy that has no binding or precedent effect and is now unnecessary because the FCC pointedly referred to its views on the use of spectral mass information as "policies", not as rules.¹²⁰ AT&T stated that in that same order, the FCC expressly stated that "these policies and rules permit the industry to work further towards deriving solutions. . . . [W]e believe that spectrum management work currently being performed in T1E1.4 will prove quite useful in ensuring the evolution of advanced services deployment in a manner that

¹¹⁹ *Id.* at ¶204.

¹²⁰ *Id.*

safeguards spectrum compatibility.”¹²¹ AT&T stated that T1E1.4 has adopted a standard –T1.417 – that did away with NC/NCI codes for spectrum management purposes, and therefore the FCC interim policy should not be enforced at this juncture. AT&T argues that CLECs should only be required to disclose NC/NCI codes in response to a spectral dispute that involves their facilities.

The facilitator concluded that Qwest has a legitimate need for the NC/NCI codes. Therefore, the facilitator recommended that SGAT Section 9.2.6.2 is appropriate. However, it should be made clear that the NC/NCI information is confidential and its use limited to spectrum management purposes, and that only those needing to know the information for that purpose shall have access to it.

At the hearing, the Commission requested Qwest to propose SGAT language that would specify the confidential treatment of the NC/NCI code information rather than rely upon the nondisclosure provisions at Section 5.16 of the General Terms and Conditions of the SGAT. In its Post-Hearing Memorandum, Qwest proposed the following subsections be added to Section 9.2.6.2 of the SGAT:

9.2.6.2.1 CLEC information provided to Qwest pursuant to Section 9.2.6.2 shall be deemed Confidential Information and Qwest may not distribute, disclose or reveal, in any form, this material other than as allowed and described in subsections 9.2.6.2.

9.2.6.2.2 The Parties may disclose, on a need to know basis only, CLEC Confidential Information provided pursuant to Section 9.2.6.2, to legal personnel, if a legal issue arise, as well as to network and growth planning personnel responsible for spectrum management functions. In no case shall the aforementioned personnel who have access to such Confidential Information be involved in Qwest's retail marketing, sales or strategic planning.

The NDPSC generally agrees with the facilitator's recommendation concerning SGAT Section 9.2.6.4, but recommends that the additional language proposed by AT&T in its comments to the facilitator's report be incorporated into SGAT Section 9.2.6.4. Therefore, the last sentence of the language recommended by the facilitator to Section 9.2.6.4 should read *Qwest also agrees that any future "known disturber" defined by the FCC or the Commission will be managed as required by industry standards, FCC rules and orders.* The NDPSC finds that Qwest made the recommended change in its North Dakota SGAT Fourth Revision dated February 19, 2002.

The NDPSC generally agrees with the facilitator's recommendations concerning SGAT Section 9.2.6.6, but recommends that language be incorporated at the beginning of the facilitator's proposed language that *Qwest will deploy remote DSL technology in a manner that will minimize spectrum compatibility issues in the future.* The NDPSC finds

¹²¹ *Id.* at ¶211

that Qwest added this language as the first sentence in SGAT Section 9.2.6.9 in its North Dakota SGAT Fourth Revision dated February 19, 2002.

The NDPSC also accepts Qwest's proposed SGAT subsections 9.2.6.2.1 and 9.2.6.2.2 and finds that Qwest added these subsections in its North Dakota SGAT Third Revision dated December 14, 2001.

g. Conditioning Charge Refund-Loops

AT&T sought to require conditioning charge refunds when Qwest fails to meet service requirements associated with the service that CLECs seek to offer over loops that have been conditioned to provide xDSL service. Qwest agreed conceptually to the notion of a credit in cases where it fails to perform conditioning in a workmanlike manner or significantly missed its due date for conditioning.

The facilitator recommended that conditioning charge refunds are appropriate where there has been a delayed conditioning followed by a customer choice not to take the CLEC service. Accordingly the facilitator recommended the following language be added to the SGAT:

Where Qwest fails to meet a due date for performing loop conditioning, CLEC shall be entitled to a credit equal to the amount of any conditioning charges applied, where it does not secure the unbundled loop involved within three months of such due date. Where Qwest does not perform conditioning in accord with the standards applicable under this SGAT, CLEC shall be entitled to a credit of one-half of the conditioning charges made, unless CLEC can demonstrate that the loop as conditioned is incapable of substantially performing the functions normally within the parameters applicable to such loop as this SGAT requires Qwest to deliver it to CLEC. In the case of such fundamental failure, CLEC shall be entitled to a credit of all conditioning charges, except where CLEC asks Qwest to cure any defect and Qwest does so. In the case of such cure, CLEC shall be entitled to the one-half credit identified above.

AT&T, in its comments to the facilitator's report, stated that the three month time period in the facilitator's recommended language is an unreasonably long period of time to be out both the loop it requested and the conditioning charges it paid. AT&T recommends that the time period be shortened to 15 days following the due date. AT&T pointed out that Qwest's interval for conditioning a loop is 15 days.

Testimony by Qwest at the hearing before the NDPSC was that Qwest's understanding of the time period in the facilitator's report is that the CLEC would have up to three months after Qwest turns over the service to the CLEC to invoke the refund option. Qwest stated that AT&T's proposal would be less burdensome on Qwest, but Qwest believes that the facilitator's proposal provides a better option for the CLECs.

The NDPSC agrees with the facilitator's recommendation and finds that Qwest has included the recommended language at Section 9.2.2.4.1 of its SGAT.

h. Pre-Order Mechanized Loop Testing

AT&T wanted Qwest to allow CLECs to perform mechanized loop testing (MLT) in order to provide the CLECs with actual loop length and performance information so the CLECs could verify that the loop can support the services they seek to provide over the loop.

Qwest responded that its representatives do not perform such tests to determine loop capabilities and that Qwest performs the tests only in cases of repairs. Qwest also said that its Loop Qualification Tool already provides MLT information to CLECs.

The facilitator determined that Qwest has not performed MLT for itself, except in one, broad scale program, the results of which are made available to CLECs. The facilitator also noted that Qwest has reason to discourage such testing because it disrupts service when it takes place. The facilitator recommended that Qwest's approach to making loop qualification information available to CLECs does not require allowing MLT in order to provide CLEC's nondiscriminatory treatment and a meaningful opportunity to compete. The facilitator recommended that Qwest should not be required to make mechanized line testing available for CLECs for so long as Qwest does not perform it for itself or its affiliates.

The NDPSC agrees with the facilitator's recommendation.

i. Access to LFACS and Other Loop Information Databases

AT&T sought access to whatever information Qwest could provide, including a system called LFACS, to give it access to a reasonably complete inventory of spare Qwest copper facilities in areas where Qwest serves end users through significant amounts of IDLC.

Qwest argued that parity with its own retail operations did not require granting access to LFACS, because Qwest retail personnel did not use LFACS in the pre-ordering process. Qwest also stated that LFACS do not have an existing search capability. Qwest also raised confidentiality concerns stating that LFACS contains confidential information about the unbundled loops of Qwest and all other CLECs using Qwest's network. Qwest argued that it has agreed to make available to CLECs other tools that would provide the kind of information that AT&T is seeking.

AT&T responded that parity is not the test here, because Qwest does not have to unbundled IDLC loops to serve it own end users. AT&T stated that the proper question to ask is whether CLECs, which have the unique need to deal with IDLC unbundling issues, have a meaningful opportunity to compete in the absence of access to

information that will allow them, on a pre-order basis, to determine if an area has sufficient copper facilities available to get around the unbundling and xDSL constraints imposed by the presence of substantial amounts of IDLC in the it might wish to serve.

The facilitator stated that parity with Qwest's retail operations is not the material standard in deciding this issue. The facilitator determined that significant Qwest deployment of IDLC in an area justifies CLEC concern about the ability to provision loops with copper, particularly where it seeks to provide data services. Although the facilitator determined that LFACs do not have the capability to provide the information that AT&T seeks, AT&T should be assured access to other available tools that appear better suited to AT&T's needs. Therefore, the facilitator recommended the SGAT should contain the following language:

In areas where Qwest has deployed amounts of IDLC that are sufficient to cause reasonable concern about a CLEC's ability to provide service through available copper facilities on a broad scale, the CLEC shall have the ability to gain access to Qwest information sufficient to provide CLEC with a reasonably complete identification of such available copper facilities. Qwest shall be entitled to mediate access in a manner reasonably related to the need to protect confidential or proprietary information. CLEC shall be responsible for Qwest's incremental costs to provide such information or access mediation.

AT&T, in its comments to the facilitator's report, argued that the facilitator's recommended language should be modified to include a provision to provide the CLECs the ability to audit Qwest's company records, back office systems and databases in each of the relevant states to determine whether Qwest is providing to CLECs the same access that Qwest employees have to loop and loop plant information. Furthermore, AT&T argued that the limitation in the facilitator's recommended language on access to loop and loop plant information should be eliminated. Finally, AT&T requested that the facilitator's suggested mediation language be eliminated and replaced by language that limits the use of information obtained by the CLEC to performing loop qualification and spare facilities checks.

The NDPSC agrees with the facilitator's recommendation and finds that Qwest has included the recommended language in its SGAT compliance filing at Section 9.2.2.2.1.1.

j. Limiting Line Sharing to UNE-P-Line Splitting

AT&T sought a commitment date by which CLECs will be allowed to use line splitting on UNE loops. Qwest responded that, while it had agreed to loop splitting, it did not recognize a need to do it, nor was it aware of any other ILEC that was providing it.

AT&T argued that line splitting in the EEL context should not be under the Special Request Process, but rather should be a standard offering subject to specified terms and conditions under the SGAT. Qwest responded that there was a very low demand for EELs, and that only seven existed in all of the seven states involved in the multistate process, and all of those seven were in Utah. Qwest argued that it should not be required to undertake the development work necessary to create a standard offering with such limited demand for the product.

AT&T also argued that line sharing should be available in the resale context. Qwest objected stating that AT&T conceded in the workshops that this was virtually identical to splitting over UNE-P. Qwest further argued that such obligation did not now exist under FCC requirements.

The facilitator determined that AT&T's objection to the lack of a definite timetable for making loop splitting available is not well founded. The facilitator recommended that if Qwest can demonstrate at the time of its filing to the FCC that it has made substantial progress in defining the specific terms and conditions applicable to loop splitting, it is reasonable to conclude that it has met its obligations under Section 271.

The facilitator further recommended that given the remarkably small current demand for EELs at all, let alone for splitting them, it is reasonable to rely upon the special request process rather than to develop standard terms and conditions as a standard offering for EEL splitting.

Finally, the facilitator recommended that splitting resold lines is an anomalous concept. The facilitator stated that "[l]oops are split; services are not," and that in the resale context, there is no CLEC loop to split.

The NDPSC agrees with the facilitator's recommendations.

k. Liability for Actions by an Agent-Line Splitting

Qwest required that a single party be responsible as the "Customer of Record" for split lines. The parties agreed that the CLEC who is not the customer of record could have access to all the identification and security passes of the other CLEC, in order to allow Qwest to recognize the contact as a legitimate one with respect to the loops at issue. The parties also agreed that Qwest should generally not be held responsible for any harm due to actions by anyone to whom the customer of record has given the identification and security passes that are sufficient to allow such person to gain access to the customer of record's account at Qwest. The parties disagreed, however, whether the third person must have obtained the identification and passes "wrongfully" from the customer of record.

The facilitator recommended that Qwest should not bear responsibility for harm to a CLEC from the CLEC's agent's or representative's use of information that the

CLEC intentionally and "rightfully" gave to the person in question. Only when a CLEC or agent has "wrongfully" obtained the information, and only where it is obtained through negligent or willful conduct, is it proper to hold Qwest responsible for claims resulting from a concession that Qwest has made to its normal customer of record procedures for the administrative convenience of CLEC customers. Therefore, no change was recommended to the SGAT for this issue.

The NDPSC agrees with the facilitator's recommendation.

l. "NID" Definition and Access to Terminals Where Qwest Owns Facilities in the Direction of the End User

This issue was discussed and considered at great length in the *Subloop Access at MTE Terminals* issue from the Workshop 2 Report on Emerging Services. In essence, AT&T argues that MTE terminals are NIDs entitling it to unmediated access to such terminals while Qwest defines access at MTEs as subloop access.

The facilitator recommended that the resolution of the issue of *Subloop Access at MTE Terminals* remains valid and applicable to the parties' debate under this issue and that experience between the parties in the future will determine whether there is a need to define access conditions further and make additional exceptions to collocation or NID access procedures and requirements.

It should be noted that in the hearing before the NDPSC, in response to a question from the NDPSC staff, Qwest acknowledged that in North Dakota, if the NID is the demarcation point and everything on the customer side is customer owned, there would be no issue because subloops would not come into play.

On November 7, 2001, Qwest filed for reconsideration of the NDPSC's *Interim Consultative Report on Group 3 Emerging Services* concerning the NDPSC's recommendation on subloop access at MTE terminals and NIDs. Qwest's May 31, 2002 Revised Notice of Updated Statement of Generally Available Terms and Conditions now sets forth interim SGAT and other interim provisions to allow the issues regarding subloop unbundling at MTE locations in North Dakota to be addressed in a separate NDPSC proceeding.

m. Protector Connections-NID

AT&T commented that SGAT Section 9.5.2.1 impermissibly restricts CLECs to NID access in cases where space is available since it does not require Qwest to remove its loop connections to the NID. AT&T stated that this policy would deny CLECs access to the NID's features and functions, which contravenes the *UNE Remand Order*.¹²²

¹²² *UNE Remand Order* at ¶233

Qwest argued that nothing in the FCC rules would oblige it to remove its connections and that doing so would violate the National Electric Code and the National Electric Safety Code.

The facilitator determined that AT&T's request fails for being inadequate in explanation and for seeking unmediated access to facilities other than the Qwest NID. Accordingly, the facilitator did not recommend any changes to the SGAT on this issue.

The NDPSC agrees with the facilitator's recommendation.

n. CLEC Use of Qwest's NID Protector Without Payment

AT&T objected in its brief to SGAT Section 9.5.3 which requires that a CLEC pay for its use of protectors at Qwest's NID in cases where the CLEC has its own protectors.

The facilitator noted the general rule that a CLEC gets access to all the functionalities and capabilities that a UNE presents to it. If a CLEC has access to all those functionalities and capabilities, it stands to reason that it should be responsible for the proper costs that go into providing all those functionalities and capabilities. Therefore, the facilitator did not recommend any changes to the SGAT for this issue.

The NDSPC agrees with the facilitator's recommendation.

o. Accepting Loop Orders with "Minor" Address Discrepancies

AT&T commented that Qwest was rejecting service orders with minor and immaterial differences between end user information on the LSR and information on Qwest's systems. AT&T asked for the addition of the following SGAT language to address this concern:

Qwest will accept CLEC orders as accurate when there are small and immaterial differences between the end user address on the CLEC order and the end user address in Qwest's records. When the end user combines a change in service to the CLEC with a change in address, Qwest will provide an ordering process that accomplishes this transition in an efficient and accurate manner.

Address validation is one of the pre-ordering functions Qwest makes available to CLECs. Qwest objected to AT&T's comments, arguing that its OSS already contains address validation tools that would allow CLECs to assure that addresses it wanted to enter were correct.

The facilitator found that the record from the workshop provided no conclusive evidence that proper use of the address validation tools would have failed to adequately rationalize CLEC and Qwest address information about customers. The facilitator deferred the evaluation of the address validation process to the ROC OSS testing.

The ROC OSS Test 12 evaluated the functional elements of Qwest's Pre-Ordering, Ordering, Provisioning, Pre-Order/Order Data Integration, and an analysis of Qwest's performance in comparison to its retail systems (Pre-ordering, Ordering, and Provisioning ("POP") Functional Evaluation). As described in Section 12 of the OSS Final Report, the POP Functional Evaluation:

The objective of this test was to validate the existence, functionality, and behavior of Qwest interfaces and processes required for pre-ordering, ordering, and provisioning transaction requests and responses. The POP functions tested were also validated against Qwest documentation that specifies those functions that are and are not available within the Qwest Operation Support Systems (OSS).

Hewlett-Packard Consulting ("HPC"), which acted as the Pseudo-CLEC in performing the ROC OSS test, separately submitted Section 12-A, Test Results: POP Functional Evaluation (Test 12), of the Final Report.

During the test, HPC recorded and tracked each transaction, including address validations, submitted through Qwest's OSS, and logged subsequent responses. HPC compared each response it received to its expectations. Whenever HPC received an unexpected response from Qwest on a transaction, it reviewed the transaction details to ascertain whether the error was the result of inaccurate test case data, transaction entry error, or a Qwest system or processing issue.

The OSS Final Report Table 12A-1.3: Evaluation Criteria and Results shows the results of the testing. These results apply to all pre-ordering functions, including address validation, and include satisfaction of the following criteria:

- Test Cross-Reference 12-2-1 -- Qwest provides complete responses to CLEC pre-order transactions.
- Test Cross-Reference 12-2-2 -- Error messages returned for pre-order transactions clearly and accurately explain the cause and source of the transaction error.
- Test Cross-Reference 12-2-3 -- The P-CLEC was able to submit valid pre-order transactions based upon publicly available Qwest information.

The NDPSC agrees with Qwest and the OSS testing results and finds that the pre-ordering process and address validation tools do allow CLECs to assure that addresses it wants to enter are correct.

4. Conclusion

Qwest has demonstrated that it will provide nondiscriminatory access to unbundled loops and should be deemed to be in compliance with the requirements for Checklist Item 4.

C. Checklist Item 5 – Access to Unbundled Local Transport

1. Background

Section 271(c)(2)(B)(v) addresses access to unbundled local transport and requires Qwest to provide local transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services. Also addressed in this section are Enhanced Extended Links or EELs. In the *UNE Remand Order*, EELs were defined as being “comprised of unbundled loops, multiplexing/concentrating equipment, and dedicated transport”

2. Overview

The parties raised a total of 17 issues related to access to unbundled local transport. Two of these issues were presented to the NDPSC with the facilitator's proposed resolution in the Group 3 Emerging Services Report, and are addressed in the NDPSC's consultative report on Group 3 issues. Six of those issues were resolved during the Workshop. Nine of the issues were presented to the NDPSC with the facilitator's proposed resolution in the Group 4 Report. A portion of one issue was deferred to the NDPSC cost docket.

The two issues addressed in the Group 3 Emerging Services consultative report were:

- Access to the Facilities of Qwest Affiliates – This issue was addressed in the *Affiliate Obligations to Provide Dark Fiber* issue in the Group 3 Report for Emerging Services
- Access to Dark Fiber in Qwest's Joint Build Arrangements – This issue was addressed in the *Access to Dark Fiber in Joint Build Arrangements* issue in the Group 3 Report for Emerging Services

The issues resolved between the parties regarding access to unbundled local transport are discussed in the facilitator's Group 4 Report. The discussion concerning “Transport” begins on page 75 of the Group 4 Report. The discussion relating to “EELs” begins on page 80. The resolved issues include:

- Available Dedicated Transport Routes
- Requiring Multiplexers for Access to Transport
- Cross Connecting UDIT and EUDIT-Transport
- Waiver of Local Use Requirements for Particular EELs
- Ways of Meeting the Local Use Requirements-EELs
- Audits of Local Use Certifications-EELs

The unresolved issues regarding access to unbundled local transport relating to “Transport” are discussed beginning on page 76 of the facilitator's Group 4 Report. The

discussion of unresolved issues concerning "EELs" begins on page 81. The unresolved issues include:

- SONET Add/Drop Multiplexing-Transport
- UDIT/EUDIT Distinction-Transport
- Commingling UNEs and Interconnection Trunks-Transport
- Applying Local Use Restrictions to Unbundled Transport
- Limiting Local Use Requirements to Existing Special Access Circuits-EELs
- Allow Commingling Where Qwest Refuses to Construct UNEs-EELs
- Waiver of Termination Liability Assessment for EELs
- Waiving Local Use Restrictions on Private Line Purchases in Lieu of EELs
- Counting ISP Traffic Toward Local Use Requirements-EELs

The issue deferred in part to the NDPSC cost docket was:

- UDIT/EUDIT Distinction-Transport (costs and prices for UDIT and EUDIT)

3. Analysis of Evidence

a. SONET Add/Drop Multiplexing-Transport

AT&T asked that Qwest change SGAT Section 9.6.1.2 to add SONET add/drop multiplexing as a CLEC option. AT&T commented that CLECs commonly would need to go from OCN to DS3, and would therefore benefit by the availability of SONET add/drop multiplexing.

Qwest was not willing to add this additional equipment as a standard offering under the SGAT for reasons summarized in the facilitator's Group 4 Report beginning at page 76.

The facilitator recommended that this issue is similar to the general treatment of the *Construction of New UNEs* issue previously discussed and that it should be resolved in the same manner. In its comments filed to the facilitator's report, AT&T stated that it and Qwest had agreed to consensus language to resolve this issue at SGAT Section 9.6.1.2 to provide as follows:

SONET add/drop multiplexing is available on an ICB basis where facilities are available and capacity exists.

The NDPSC finds that Qwest has added the consensus language to Section 9.6.1.2 of its SGAT filing and therefore this issue can be considered resolved.

b. UDIT/EUDIT Distinction-Transport

Qwest's SGAT offers Unbundled Dedicated Interoffice Transport (UDIT) for dedicated transport routes between Qwest's wire centers. Qwest's SGAT offers

Extended Unbundled Dedicated Interoffice Transport (EUDIT) for dedicated transport where one end of a transport trunk is not at a Qwest wire center. UDIT is priced on a distance-sensitive basis, while the pricing for EUDIT is not distance sensitive. Qwest confirms that it made the distinction between UDIT and EUDIT as a way to preserve the historical pricing differences between the two.

AT&T argues that (1) dedicated transport consists of a single element and Qwest's attempts to distinguish UDIT and EUDIT are impermissible; (2) that both UDIT and EUDIT should be priced on a distance-sensitive basis; (3) that Qwest should not be permitted to carry over from the access world the average pricing reflected in non-distance-sensitive EUDIT pricing; and (4) that Qwest must provide along with EUDIT, the electronics necessary to permit the transmission of signals as required by the FCC.¹²³

In its August 30, 2001 comments to the NDPSC, AT&T emphasizes that this issue has more significance than a simple UNE price level. AT&T alleges that Qwest's UDIT-EUDIT distinction perpetuates different rate design for its two types of dedicated transport that should be priced the same, specifically, that Qwest's UDIT and EUDIT should be one UNE that is priced according to its distance-sensitive, flat-rated cost characteristics. AT&T alleges that, under Qwest's UDIT/EUDIT pricing distinction, CLECs lose the cost benefits of electing to build closer to the Qwest wire centers. AT&T also alleges that the UDIT/EUDIT distinction imposes disincentives on the CLEC to build facilities to a meet point between the CLEC wire center and Qwest wire center. AT&T states the UDIT/EUDIT pricing distinction is discriminatory, favoring the distance sensitive UDIT over the non-distance sensitive EUDIT.

Qwest agreed to allow the issue of the costs for UDIT and EUDIT be decided in cost dockets before the state commissions.

The facilitator recommended that questions regarding UNE prices are best resolved on the basis of detailed cost information in a state cost docket, and that, with Qwest's agreement that UDIT and EUDIT are not separate UNEs but rather, at most a single UNE with two distinct pricing components, nothing further is required.

The NDPSC agrees with the facilitator's recommendation that the issues be deferred to the state cost docket.

Qwest's SGAT does not provide for the installation of new electronics or the upgrade of existing electronics at a CLEC wire center for the purpose of allowing existing fiber facilities to function as transport elements. AT&T argues that Qwest must provide the electronics, otherwise the dedicated transport it is paying for is not "energized" to permit the transmission of voice or data. AT&T believes the FCC made it clear that dedicated transport includes the electronics: "We clarify that this definition

¹²³ *UNE Remand Order* at ¶356

includes all technically feasible capacity-related services, *including those provided by electronics that are necessary components of the functionality of capacity-related services and are used to originate and terminate telecommunications services.*"¹²⁴

The facilitator recommended that AT&T's request that Qwest be required to install or modify electronics in association with providing a transport UNE, is neither consistent with the general rule applicable to building new UNEs, nor does it fall within a reasonable interpretation of Qwest's obligation to modify facilities.

As stated previously in this proceeding, the legislature has given the NDPSC's authority under a North Dakota law which authorizes the NDPSC to adopt rules consistent with state law to carry out the provisions of these specific sections dealing with the Act, but has limited the NDPSC's such that the rules "may not impose obligations on a telecommunications company that are different or greater than obligations imposed under the Act. Therefore, if the requirement to provide electronics on the CLEC end of dedicated transport has been ruled by the FCC, then the electronics must be provisioned in the North Dakota SGAT.

c. Commingling UNEs and Interconnection Trunks-Transport

AT&T's brief argued that Qwest's SGAT applies a definition of "finished services" and uses it to preclude CLECs from connecting UNEs to trunks used for interconnection (called LIS Trunks). AT&T asked that LIS Trunks be excluded from the definition "finished services" under the SGAT.

Qwest agreed in its brief to delete LIS Trunks from the definition of "finished services" and conceded that LIS Trunks could be connected with UNEs.

The facilitator recommended that with Qwest's change to the SGAT and its recognition that there is no SGAT prohibition on commingling UNEs and LIS Trunks in the same facilities, this issue can be considered closed.

The NDPSC agrees with the facilitator's recommendation.

d. Applying Local Use Restrictions to Unbundled Transport

AT&T argued that SGAT Section 9.6.2.4 improperly prohibits the use of interoffice transport as a substitute for special or switched access services. The FCC's *Supplemental Order* prohibits CLEC or IXC conversion of special access to loops/transport combinations, absent a significant amount of local exchange service to a

¹²⁴ *UNE Remand Order* at ¶323 (emphasis added)

particular customer.¹²⁵ AT&T indicated it would agree to the following language that Qwest proposed in other jurisdictions:

CLEC shall not use EUDIT as a substitute for special or Switched Access Services except to the extent CLEC provides such services to its end user customers in association with local exchange services. Pending resolution by the FCC, Qwest will not apply the local use restrictions contained in 9.23.3.7.2.

The NDPSC finds that Qwest has included the proposed language in its SGAT compliance filing at Section 9.6.2.4 and therefore this issue can be considered resolved.

e. Limiting Local Use Requirements to Existing Special Access Circuits-EELs

ELI commented that Utah arbitration orders and the FCC have limited local use certification requirements to existing special access circuits; therefore, SGAT Section 9.23.3.7.1 impermissibly extends those requirements to UNE combinations to be newly acquired by a CLEC. Qwest responded that the FCC's *Supplemental Order Clarification* clearly applied to new combinations, as well as the conversion of special access facilities.¹²⁶

The facilitator determined that EELs, whether converted from special access circuits or not, are unbundled loop – transport combinations. Therefore, new EELs are subject to the same local use certification requirements as are converted special access circuits. There is no sound reason for distinguishing between the circumvention of access charges on converted UNEs versus new UNEs.

The NDPSC agrees with the facilitator's recommendation.

f. Allow Commingling Where Qwest Refuses to Construct UNEs-EELs

AT&T argued that Qwest should not be permitted to refuse commingling UNEs and tariffed services in certain cases where Qwest refuses to construct UNEs. The specific situation of concern to AT&T is the case where there are no DS1 loops available as UNEs and Qwest refuses to construct facilities to provide an unbundled DS1 loop.

Qwest responded to the EEL commingling issue by reciting paragraph 28 of the *Supplemental Order Clarification*, in which the FCC explicitly said it would not eliminate

¹²⁵ Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, Supplemental Order, FCC 99-370 (rel. Nov. 24, 1999), ("Supplemental Order").

¹²⁶ In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, FCC 00-183, Supplemental Order Clarification ¶16 (June 2, 2000) ("Supplemental Clarification Order").

the commingling prohibition, which it defined as "combining loops or loop- transport combinations with tariffed special access services."

The facilitator recommended that it is appropriate that the connection of UNEs that AT&T wants should be permitted under controlled circumstances because no loop or loop/transport UNE are being commingled with a tariffed service; the tariffed service is itself the access to the DS1 loop. Therefore, the facilitator recommended the following language should be included in the SGAT:

Where a CLEC has been denied access to a DS1 loop as a UNE due to lack of facilities, and where the CLEC has requested and been denied the construction of new facilities to provide such loop, a CLEC may connect a tariffed service that it secures in lieu of that UNE to a transport UNE that it has secured from Qwest. Before making such connection, the CLEC shall provide Qwest with evidence sufficient to demonstrate that it has fulfilled all of the prior conditions of this provision. This provision shall be changed as may be required to conform to the decisions of the FCC under any proceedings related to the Public Notice referred to in document FCC 00-183.

Qwest included the recommended language in its compliance SGAT at Section 9.23.1.2.3. In its comments to the facilitator's report, AT&T requested modification of the recommended language by inserting the words "or other high-capacity" after the word "DS1".

At the NDPSC hearing on the Group 4 issues, the Commission asked that Qwest give additional thought to AT&T's proposed modification to the facilitator's recommended SGAT language change. Subsequently, in its Post-Hearing Memorandum and in response to AT&T's request, Qwest proposed the following revisions:

Where a CLEC has been denied access to a DS4 loop as a UNE due to lack of facilities, and where the CLEC has requested and been denied the construction of new facilities to provide such a loop, a CLEC may connect a similar bandwidth tariffed service that it secures in lieu of that UNE to a transport UNE that it has secured from Qwest. Before making such connection, the CLEC shall provide Qwest with evidence sufficient to demonstrate that it has fulfilled all of the prior conditions of this provision. This provision shall be changed as may be required to conform to the decisions of the FCC under any proceedings related to the Public Notice referred to in document FCC 00-183.

Qwest believes this revision not only addresses AT&T's concerns relating to higher capacity loops but also includes DSO loops. The revision also prevents gaming the SGAT by ordering services and UNEs of different bandwidths.

The NDPSC agrees with the facilitator's recommendation and adopts Qwest's proposed modification of the recommended SGAT language. The NDPSC finds that Qwest has included all the proposed revisions in its SGAT compliance filing at Section 9.23.1.2.3.

g. Waiver of Termination Liability Assessment for EELs

The evidence of record at the workshops demonstrates that CLECs have purchased special access circuits in cases where Qwest is now making EELs available. The facilitator concluded that CLECs are paying higher interstate access tariff rates for facilities that can now be acquired as EELs.

AT&T argued that CLECs should not have to pay termination charges when they seek to transform private lines into EELs when the private lines were purchased prior to the time Qwest began providing EELs.

Qwest, in its brief, offered to waive any rights to recoup termination liability assessments (TLAs) under certain specified conditions, on an individual case basis with each CLEC.

The facilitator determined that Qwest's proposal was generally acceptable but raised some questions. To resolve those questions, the facilitator recommended the following SGAT language:

Qwest will waive any TLA charge otherwise applicable under the agreement or tariff election by which a CLEC ordered or augmented a special access circuit under interstate tariff between February 17, 2000 and May 16, 2001, provided that CLEC identifies and communicates in writing to Qwest on or before November 30, 2001 each circuit it believes to qualify hereunder. Nothing herein shall be construed as expanding the rights otherwise granted by this SGAT or by law to elect to make such conversions.

The NDPSC agrees with the facilitator's recommendation and finds that Qwest has added the recommended language to SGAT Section 9.23.3.12.

h. Waiving Local Use Restrictions on Private Line Purchases in Lieu of EELs

AT&T argued that where a CLEC determines it is not economic to convert special access/private line circuits to EELs because of TLAs, the CLEC should have the option to connect special access/private lines that would qualify as EELs to UNEs. Qwest prohibits this combination of UNEs and tariffed services.

The facilitator recommended that the easing of TLA application as recommended under the previous section will serve to adequately address the concern that TLA

application by Qwest would inhibit CLEC elections to convert special access circuits that it ordered while challenges to Qwest's policies were pending. No further relief is necessary to provide for a fair and equitable means of allowing access to EELs in the manner and in the cases allowed by the FCC.

The NDPSC agrees with the facilitator's recommendation.

i. Counting ISP Traffic Toward Local Use Requirements-EELs

XO and ELI argued that ISP traffic should be counted toward local use requirements, because it presents no threat of avoiding special access charges, from which ISP traffic continues to be exempt. These participants argued that not doing so would produce improper discrimination, because Qwest could require CLECs to use more costly special access service for ISPs, while Qwest could provide its ISP customers with less expensive local exchange service. XO/ELI contended that the FCC's recent order on ISP traffic and reciprocal compensation should not alter the classification of such traffic for this purpose.

Qwest argued that ISP traffic could not be defined as local because the *ISP Remand Order* held indisputably that such traffic was interstate in nature.¹²⁷

The facilitator determined that ISP traffic couldn't count, under any practical application of the FCC requirements, as local usage.

The NDPSC agrees with the facilitator's recommendation.

4. Conclusion

Qwest should be deemed to be in compliance with the requirements for providing CLEC access to unbundled local transport unless the FCC requires that Qwest offer to provide the electronics on the CLEC end of the EUDIT.

D. Checklist Item 6 – Access to Unbundled Local Switching

1. Background

Section 271(c)(2)(B)(vi) requires Qwest to provide "[l]ocal switching unbundled from transport, local loop transmission, or other services." The FCC in the *Local*

¹²⁷ Order on Remand and Report and Order, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996 and Inter-Carrier Compensation for Internet Bound Traffic, CC Docket Nos. 96-98 and 99-68, FCC 01-131 at ¶58 (rel. April 27, 2001).

*Competition Order*¹²⁸ identified local switching as an unbundled network element, and this was confirmed in the *UNE Remand Order*.

*[w]e require incumbent LECs to provide local switching as an unbundled network element.*¹²⁹

The FCC did find an exception to this rule under certain market circumstances:

*We find that, where incumbent LECs have provided nondiscriminatory, cost based access to combinations of loop and transport unbundled network elements, known as the Enhanced Extended Link (EEL), requesting carriers are not impaired without access to unbundled switching for end users with four or more lines within density zone 1 in the top 50 metropolitan statistical areas (MSAs).*¹³⁰

None of the top 50 MSAs is located in North Dakota. Therefore, the FCC's exception to the switching unbundling requirement does not apply in North Dakota.

2. Overview

The parties raised a total of 11 issues for discussion related to access to unbundled local switching. Of those issues, 7 were resolved between the parties during the Workshop, 4 were unresolved and presented to the NDPSC with the facilitator's proposed resolution in the Group 4 Report.

The issues resolved between the parties regarding access to unbundled local switching are discussed in the facilitator's Group 4 Report beginning on page 90. The resolved issues include:

- Specifying Additional Types of Switch Access
- Availability of Switch Features
- Unbundling Switch Centrex Management and Control Features
- Notice of Switch Changes and Upgrades
- Unbundling Tandem Switching
- Definition of Tandem Switching Element
- Tandem to Tandem Connections

The unresolved issues regarding access to unbundled local switching are discussed in the facilitator's Group 4 Report beginning on page 92. The unresolved issues are:

- Access to AIN-Provided Features

¹²⁸ *Local Competition Order* at ¶410-427.

¹²⁹ *UNE Remand Order* at ¶253

¹³⁰ *Id.*

- Exemption from Providing Access to Switching in Large Metropolitan Areas
- Basis for Line Counts in Applying the Four-Line Exclusion
- Providing Switch Interfaces at the GR-303 and TR-008 Level

3. Analysis of Evidence

a. Access to AIN-Provided Features

Special features can be provided by the switch or through the development of software based capabilities through Qwest's Advanced Intelligent Network (AIN). The latter approach can avoid limitations that are built into the switch intelligence that switch vendors provide. At issue is whether Qwest must provide access to AIN provided features or, instead, to AIN feature development capabilities, which would allow CLECs to develop their own competing features.

Qwest contends that it need not make access to its own AIN features available to CLECs. Qwest contends that the FCC does not require incumbents to make available to CLECs the software that provides an end user feature, but Qwest need only make available the same capabilities that Qwest uses to create the feature-providing software. Qwest makes available to CLECs all switch-provided features, whether or not Qwest has activated them in its switches. Qwest also said that it makes available, to the full extent required by the FCC, the feature development capabilities of its AIN.

AT&T considered the FCC's consideration of the issue to be inadequate, arguing that CLECs should have access to the AIN-provided features that Qwest has developed.

The facilitator determined that Qwest does provide all available switch features to CLECs. The facilitator further determined that Qwest meets the current FCC standard to provide the capability for CLECs to develop their own AIN-based features, rather than having to provide the results of Qwest's own use of those same capabilities to provide its own features. The facilitator recommended there is no basis for concluding that Qwest should, in order to meet its checklist obligations, be required to provide CLECs with access to the AIN-developed features themselves or the software that delivers them.

The NDPSC agrees with the facilitator's determination.

b. Exemption from Providing Access to Switching in Large Metropolitan Areas

AT&T argued that SGAT Section 9.11.2.5 improperly limited the availability of unbundled switching in the top 50 MSAs to end users with four or more access lines within a wire center. Only one wire center in the 7 collaborative workshop states would

qualify; it is the Salt Lake Main wire center in Salt Lake City, Utah. In its August 30, 2001 comments to the NDPSC, AT&T recommended that the Commission adopt language that makes clear that unbundled switching should be made available when Qwest cannot make an EEL available to the CLEC. We agree with AT&T's argument.

However, because this FCC exemption from the switching unbundling requirement does not apply to any North Dakota wire center, the issue has no application in North Dakota. The NDPSC would prefer and recommends that Section 9.11.2.5 and its subsection(s) be removed from the North Dakota SGAT.

c. Basis for Line Counts in Applying the Four-Line Exclusion

With regard to the FCC's MSA unbundled switching exception, AT&T argued that neither the FCC nor the SGAT Section 9.11.2.5 were clear in explaining whether the three-line maximum per customer should be applied on a per customer or per location basis.

Because this FCC exemption from the switching unbundling requirement does not apply to any North Dakota wire center, the issue has no application in North Dakota and, as noted above, the NDPSC prefers that Section 9.11.2.5 and its subsection(s) be removed from the North Dakota SGAT.

The NDPSC finds that Qwest removed SGAT Section 9.11.2.5 and its subsections in its North Dakota SGAT Fourth Revision filed February 19, 2002.

d. Providing Switch Interfaces at the GR-303 and TR-008 Level

During the Workshops, AT&T requested that Qwest provide switch interfaces at the GR-303 and the TR-008 level. Qwest incorporated into SGAT Section 9.11.1.1.2, language that it feels will give AT&T the access it sought.

In its comments to the Group Report, AT&T stated that Qwest's SGAT language resolves this issue for AT&T.

The NDPSC finds that Qwest has included the proposed language in its SGAT compliance filing at Section 9.11.1.1.2 and therefore this issue can be considered resolved.

4. Conclusion

Qwest should be deemed to be in compliance with the requirements for providing CLEC access to unbundled local switching.